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No. 98-102

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In The

Supreme Court of the United States

October Term, 1997

PETE LIEN & SONS, INC., a South Dakota corporation doing business in Colorado as Colorado Lien Company,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER; JOHN CLARKE, JANET DUVALL, AND JIM DISNEY, in their Capacity as Members of the Board of County Commissioners of Larimer County, Colorado,

Respondents,

v.

THE SANDY FLATS DEFENSE COALITION, A Colorado Nonprofit Corporation,

Respondent/Intervenor.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Colorado

BRIEF OF RESPONDENT/INTERVENOR IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where a mining company leases the right to mine a single substance in a subsurface estate, knowing that the exploitation of that limited interest requires the prior approval of the County, can the mining company claim a categorical taking, if the County denies the mining company's request to mine?

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STATEMENT OF THE CASE

The Sandy Flats Defense Coalition ("the Coalition") is comprised of people who live near the site of the proposed Sandy Flats silica sand mine, that is the central focus of this case. They are the people most directly affected by the decisions involved in this controversy. The Coalition includes individuals who spoke in opposition to the application of Pete Lien & Sons, Inc. ("the Mining Company") at the public hearing before the Larimer County Board of County Commissioners ("the County"), as well as others who oppose the application. Many members of the Coalition and their families have lived and ranched in the Sandy Flats area for generations and intend to continue to do so for generations to come. Needless to say, this Court's decision is of critical importance to the Coalition's members, as it is they who will, literally, have to live with it.

In general, the Coalition agrees with and adopts the Statement of the Case provided in the Brief in Opposition filed by the Respondent County. In addition, the Court should know the following, all of which is undisputed and well-supported by the record.

Pursuant to a 1994 lease agreement with Rock Springs Royalty Company, the Mining Company acquired a narrowly limited interest in the mineral estate of certain property. It acquired a lease that permitted it to mine a single mineral – silica sand. At the time it acquired its interest, the Mining Company knew it could not exploit that interest without the approval of the County, acting through the Board of County Commissioners. After the Mining Company submitted its application to the County,

the Commissioners held a public hearing on the matter. That hearing began the evening of February 6, 1995. The hearing continued for several hours, with extensive presentations being made by the Mining Company and members of the Coalition. The Coalition, appearing without counsel, provided evidence that the proposal was for an open pit mining operation; that the substance to be mined, silica sand, is very fine and easily blows in the wind; that the area where the open pit was proposed is continuously subject to high winds; that as a result of just the test hole blasted by the Mining Company adjoining landowners could scoop up silica sand dust that had blown onto their property by the hand full; that such blowing silica sand dust may cause health problems for humans and livestock in the area; and that matters associated with operating the mine would have substantial adverse impacts on the area, including shaking residences when blasting occurs, and substantially increasing truck hauling on narrow, unpaved county roads. The mining company also provided a full and complete presentation to the Commission, including statements by several expert witnesses. In the early morning hours of February 7, 1995, the Commissioners voted 2 to 1, to deny the Mining Company's application. The Commissioners' decision was affirmed following an appeal to the District Court of Larimer County, Colorado, on November 29, 1995 and then by the Colorado Court of Appeals on August 28, 1997. The Mining Company's petition for certiorari was denied by the Colorado Supreme Court on April 20, 1998. The Mining Company now seeks review on certiorari by the United States Supreme Court.

ARGUMENT

I. THE CONSTITUTIONAL ISSUES RAISED BY THE MINING COMPANY ARE IDENTICAL TO THOSE RESOLVED IN THE *PENN CENTRAL* CASE WHICH DEMONSTRATES THERE WAS NO CATEGORICAL TAKING OF PROPERTY FROM THE MINING COMPANY

The Mining Company's entire argument that certiorari should be granted is based on its conclusion that this case involves what it characterizes as a "categorical taking." If governmental action rises to the level of a "categorical taking" then, according to the Mining Company, no ad hoc analysis into the governmental interests involved is required. A taking has occurred and the government must pay compensation. This Court has previously held that what the Mining Company characterizes as a "categorical taking" occurs in only two circumstances: Where there has been a physical invasion of the property by the government, or where the government's action has deprived the property owner of all economically beneficial or productive use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 198 (1992). The Mining Company does not claim the County physically invaded its property. The sole basis for the Mining Company's claim is that by denying the Mining Company's application for an open pit silica sand mine, the County deprived the Mining Company of all beneficial or productive use of its property.

The fundamental flaw in the Mining Company's argument is that, as a matter of law resulting from the

prior decisions of this Court, depriving the Mining Company from exploiting one element of the subsurface estate using an open pit mine does not constitute a categorical taking. The issue presented by this case was previously presented to and thoroughly addressed by this Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed 2d 631 (1978).

A. The County's Denial Of The Mining Company's Application To Mine Silica Sand From An Open Pit Was Not A Categorical Taking Of The Mining Company's Property

As the Court may recall, Penn Central owned Grand Central Terminal which was designated a Historic Landmark under New York City's historic preservation ordinance. Such designation restricted the owner's use of the property and required approval of plans affecting the building by the Landmarks Preservation Commission. As the owner Penn Central divided the property into a surface estate and an above-surface estate, which is referred to in the opinion as "superadjacent airspace." Penn Central then entered into a renewable 50-year lease and sublease agreement of the severed above-surface estate with UGP Properties, Inc. UGP and Penn Central sought approval to build a 50 story office building over and above the Terminal but leaving the Terminal unharmed. The Commission denied UGP's request. Penn Central and UGP filed suit claiming they had been completely deprived of their above-surface estate and as such had suffered a "taking" under the 5th and 14th Amendments.

Although two issues were raised by Penn Central, this Court held that it need only address the first:

> Whether restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment.

98 S.Ct. at 2658

The arguments raised by Penn Central were the same as the Mining Company seeks to argue in this case. Penn Central argued:

> [t]he Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superadjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

98 S.Ct. at 2662

In the present case the Mining Company seeks to argue that the County has deprived them of any gainful use of their subsurface rights, irrespective of the value of the remainder of the subsurface estate or the surface estate, thus entitling them to just compensation. (See Petition, pp. 12-15)

In rejecting Penn Central's claim, this Court made two things perfectly clear. First, in considering takings claims, property must be considered as a whole. A takings claim cannot be created by dividing up the bundle of

sticks commonly viewed as constituting ownership of property. At page 2662, the *Penn Central* Court held:

> The submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, . . . but also approving those prohibiting both the subjacent . . . and the lateral . . . development of particular parcels. *"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.* In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole – here the city tax block designated as the "landmark site." (emphasis added)

The property in question must be considered as a whole and the same is true whether the part that is sought to be separated out is above the surface or below the surface. This limitation is particularly applicable to the Mining Company that seeks not only to separate out the subsurface estate, but attempts to base its claim on its inability to develop only one element of that subsurface estate. If all the airspace development rights above Grand Central Station are not a sufficient separate interest to support a takings claim, then certainly the subsurface development rights for silica sand below the property involved in this case is insufficient as well.

B. The Mining Company's Loss Of, At Most, One Stick From The Ownership Bundle, Does Not Constitute A Taking

In addition to holding that the property must be considered as a whole, the Court in *Penn Central* also held that when all that is lost as a result of the governmental action is one stick from the bundle of property rights, there is no taking. The Landmark Commission's denial of the specific proposal put forth by Penn Central did not constitute elimination of all value of the above-surface estate:

> Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal . . . First, it simply cannot be maintained, on this record that appellants have been prohibited from occupying any portion of the airspace above the terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. . . .

98 S.Ct. at 2665

The fact that the County denied the Mining Company's proposal to create a large open pit mine to extract a very fine, easily windblown material in an area regularly subject to high winds is no indication, (and there is nothing in the record to suggest) that the Commission would preclude the mining of other substances in the property or the use of other, less noxious methods. All

the Mining Company has lost is the ability to mine silica sand through an open pit operation. This can be characterized, at most, as the loss of a single stick in the bundle, which does not constitute a taking. *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979).

The fact that the Mining Company voluntarily contracted to obtain only this one stick, does not elevate its loss from an appropriate governmental regulation to an unconstitutional taking. This concept, that takings claims are not created by splitting off limited interests in property, was reiterated by this Court a decade after *Penn Central*, in *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S.Ct. 1232, 480 U.S. 470, 94 L.Ed.2d 472 (1987). In addressing whether Pennsylvania's Subsidence Act constituted a taking of coal, the Court held:

> . . . Petitioners have sought to narrowly define certain segments of their property and assert that, when so defined, the Subsidence Act denies them economically viable use. They advance two alternative ways of carving their property in order to reach this conclusion. First, they focus on the specific tons of coal that they must leave in the ground under the Subsidence Act, and argue that the Commonwealth has effectively appropriated this coal since it has no other useful purpose if not mined. Second, they contend that the Commonwealth has taken their separate legal interests in property – the "support estate."
>
> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of

property "whose value is to furnish the denominator of the fraction."

Keystone at 1248

In the present case, the mining company cannot create a takings claim by obtaining only a limited interest in a portion of the mineral estate. If the mining company's interest is a separate estate for takings purposes, then an owner of real property can create an assurance that a right on review becomes an absolute use by right, or assert a takings claim – merely based on how they divide up their bundle. This is precisely what this Court has previously determined **cannot** be done. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). At page 2290 the Court held:

> While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety," . . . we rejected this analysis years ago in *Penn Central Transp. Co. v. New York City* . . . , where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question. Accord, *Keystone Bituminous Coal Assn. v. DeBenedictis*. (citation omitted).

This Court has recognized the evil that would result from allowing the division of property interests in the

manner sought by the Mining Company. Every regulation could be converted to a categorical taking simply by splitting off the interest that is being regulated from the rest of the property. In *Keystone*, this Court held:

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes.

Keystone at 1248

The difference between *Penn Central* and this case is that *Penn Central* involved a separate interest above the surface, while this case involves a separate interest below the surface. *Penn Central* clearly held that above-surface rights are not separate interests for "takings" purposes. The Mining Company has provided no basis for treating its subsurface interests different from Penn Central's above-surface interests. There is no new issue here, and certiorari should be denied.

II. THE MINING COMPANY KNEW THE INTEREST IT OBTAINED WAS CONTINGENT IN NATURE, AND THE MINING COMPANY COULD EASILY HAVE PROTECTED ITSELF AGAINST THE INJURY IT NOW CLAIMS

This outcome is particularly appropriate where, as here, the Mining Company knew at the time it acquired its interest, that their ability to use that interest was contingent upon the County's approval of their proposed mining operation. The entire problem faced by the Mining Company would easily have been avoided. All the Mining Company needed to do was make the lease with Rock Springs Royalty Company contingent upon obtaining the County's approval of their mining proposal. Having failed to take this simple, adequate precaution, the Mining Company must be deemed to have assumed the risk that the County might deny their application. See *Salsberry v. District of Columbia Board of Zoning*, 357 A.2d 402 (D.C. App. 1976) (hardship stemmed from Petitioner's contracting to purchase the property without conditioning the contract on the securing of a variance.)

III. THE CATEGORICAL TAKINGS CASES RELIED ON BY THE MINING COMPANY ARE NOT RELEVANT TO THIS CASE

The foregoing discussions and the holdings of this Court in *Penn Central*, *Keystone*, and *Concrete Pipe* make it clear that this is not a categorical takings case. Accordingly, the Mining Company's discussion of categorical takings cases such as *Lucas* and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) is simply not applicable to the present case.

Likewise, the Mining Company's concern that Colorado and other states may have different understandings of categorical takings are irrelevant because this is not a categorical takings case.

IV. CONCLUSION

The bottom line is that the Mining Company got exactly what it bargained for. It did not buy the property involved in this case. It did not even buy all of the mineral estate. It purchased a specific interest, and it knew its interest could only be exercised with the County's approval. After an extensive hearing, for reasons well supported by the evidence and not challenged by the Mining Company in its Petition, the County denied the Mining Company's request for an open pit silica sand mine. At most, one stick in the bundle associated with the property has been eliminated. No categorical taking of the entire property has occurred. All issues involved were considered and decided by this Court in *Penn Central*. For the reasons set forth above, as well as those contained in the County's Brief in Opposition, certiorari should be denied.

Dated: September 14, 1998

Respectfully submitted,

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